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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

[illegible] IOWA HYDRO-ELECTRIC COOPERATIVE, PETITIONER,

vs.

FEDERAL POWER COMMISSION, ET AL.

[illegible] TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[illegible] CERTIORARI FILED NOVEMBER 26, 1945.

[illegible] CERTIORARI GRANTED JANUARY 7, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, PETITIONER,

vs.

FEDERAL POWER COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Case No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

Joint Appendix

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR LICENSE

Project No. 1853

1. The First Iowa Hydro Electric Cooperative, a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business at 215 Hershey Building, Muscatine, in the state of Iowa, hereby makes application to the Federal Power Commission for a license to authorize the construction, operation, and maintenance of certain project works fully described herein.

2. The name, title, and post-office address of the person to whom correspondence in regard to the application shall be addressed is as follows:

H. J. Strong, Secretary, 1011 E. High Street, Davenport, Iowa.

3. The applicant is a corporation and is organized under the following laws:

Chapter 390-G-1 Iowa Code 1935.

Section 8341 Iowa Code 1935 to such extent as is not inconsistent with Chapter 390-G-1 Iowa Code 1935.

Such powers, rights and privileges as are granted bodies corporate under Chapters 363, 364, 365 and 366 Iowa Code 1935.

All more fully detailed in applicant's Articles of Incorporation attached hereto and marked Exhibit "A".

[fol. 2] 4. The measure of control or ownership exercised by the applicant in any other organization is as follows:

None.

5. The applicant operates and or proposes to operate in the following states:

Iowa, Illinois.

6. The following is a general description of the proposed project:

(a) An earthen dam is to be constructed in Sections 12, 11, 2 and 3 of Township 77 N, R 3 W, and 25, 26, 35, Township 78 N, R 3 W, of the 5th P. M., Muscatine County, State of Iowa, across the Cedar River. A primary reservior of approximately 11,000 land acres will thus be created. Two smaller reservoirs, having areas of 920 and 160 acres shall be created by the canal structure and intake dam in Sections 12, 13, 14, 15, 23 and 24 of Township 77 N, R 2 W, and Sections 7, 17, 18, 19, 20, 29, and 30, Township 77 N, R 1 W, of the 5th P. M., Muscatine County, State of Iowa.

(b) A diversion canal shall extend from the primary reservior commencing, approximately, near the South West corner of Section 6, Township 77 N, R 2 W, of the 5th P. M., and thence South East to a point on the Mississippi River above Muscatine, Iowa, at the mouth of Geneva Creek.

(c) Intake and dam structure shall be located at the bluff about 1,700 feet from the Mississippi River Bank. Tailrace will be hewn through rock so as to lead the discharged water from the outlet of the draft tubes, to the Mississippi River. Power House shall have an initial installed capacity of approximately 50,000 kilowatts.

[fol. 3] (d) Pumping units shall be utilized to draw water from the Mississippi River through the tailrace and up into the two head bays back of the power intake dam. Canal gates will be installed at the head of the canal so that the maximum head may be obtained in the head bays. 20,000 kw. standby energy will be required during off peak hours to supply these pumping units. By means of this off peak pump shortage, it will be possible to raise the firm capacity of the installation to 18,000 kw.

(e) Transmission lines for interconnection with a source of steam standby current will extend from the power house

to the nearest source of energy, tentatively, near the City of Davenport, Iowa.

7. The location of the project applied for is as follows:

(a) The State of Iowa.

(b) In the Counties of Muscatine and Cedar.

(c) On the following named stream, Cedar River, having carried commerce to St. Louis, Missouri and other interstate transportation.

(d) In the region of the following named Cities and Towns:

Approximately 6½ miles northwest of Muscatine, Iowa; 25 miles south and west of Davenport, Iowa, Rock Island and Moline, Illinois and the government manufacturing arsenal, Rock Island, Illinois; 60 miles north and east of Burlington, Iowa; 50 miles S. E. of Cedar Rapids, Iowa; 24 miles south and east of Iowa City, Iowa.

Close to existing R. E. A. cooperative transmission lines extending from the approximate site of the proposed project to nine (9) counties in the State of Iowa.

[fol. 4] 8. The following lands of the United States will be affected by the project:

Two (2) small islands situated in the Cedar River approximately 5½ and 6½ miles respectively, above the proposed dam site and within the storage lake area—Lot 4, Sec. 6 and Lot 7, Sec. 8, T 78 N., R. 2 W., 5th Principal Meridian, Iowa.

These are vacant public lands according to the records of the General Land Office and are included in Power Site Classification No. 321, dated December 5th, 1940.

9. The proposed scheme of development of the project is as follows:

50,000 kw. capacity of generating units are to be installed, operating at an average head of 93½ feet of water. It is expected that the system will operate at a minimum load factor of 36% or at an average kw. load of 18,000. Pumped storage, together with the purchase of off-peak energy will be utilized to firm up the energy generated as a result of the stream flow.

The following is a tabulation of the expected operating results:

Power available 90 to 100% of the time, utilizing pumped storage and reservior storage	=	18,000 kw.
Power available 90 to 100% of the time, utilizing lake storage only (no pumped storage)	=	5,220 kw.
Proposed initial capacity	=	50,000 kw.
Proposed ultimate capacity (including Rochester Dam and Powerhouse)	=	100,000 kw.
Load factor on System	=	36%

[fol. 5] Energy Transactions

Average Year

Firm yearly output (at 18,000 kw. firm capacity)	=	158,000,000 kwh.
Portion of firm output delivered off-peak hours	=	30%
Yearly kwh. delivered during off-peak hours	=	47,500,000 kwh.
In 33 years total deficiency to make up 158,000,000 kwh. per year (from Hydrograph)	=	1,246,780,000 kwh.
Off-peak portion of deficiency	=	1,071,200,000 kwh.
Average off-peak deficiency per year	=	32,500,000 kwh.
Balance of deficiency to be supplied by pumping in 33 years	=	175,580,000 kwh.
Average yearly deficiency to be supplied by pumping	=	5,300,000 kwh.
Average energy purchases required for pumping (1.6 x deficiency)	=	8,500,000 kwh.
Total Average Energy Purchases	=	41,000,000 kwh.

Minimum Year

Deficiency in firm energy	=	100,900,000 kwh.
Supplied directly as off-peak energy	=	47,500,000 kwh.
Balance of deficiency by pumping	=	53,400,000 kwh.
Purchases required (1.6 x deficiency)	=	85,440,000 kwh.
Total off-Peak Energy Purchased	=	132,940,000 kwh.

[fol. 6] On the basis of the above tabulation it is evident that it is possible to produce 158,000,000 kwh. of firm energy annually as a result of:

(1) Utilizing the regulated flow of the stream.

(2) Purchasing an average of 32,850,000 kwh. off-peak energy per year.

(3) Utilizing pumped storage on dry years in which the stream-flow is appreciably below that of the average year—on dry years an average of 8,500,000 kwh. per year in addition to the above.

Available Secondary (Dump) Energy

In addition to the 158,000,000 kwh. firm energy thus made available, a considerable amount of secondary energy exists. From the duration curves the average generation from 1903 to 1939 equals 184,000,000 kwh. Of this only 120,200,000 kwh. per year is produced as firm energy. This leaves therefore, a net of *63,800,000* kwh. average secondary or dump energy available.

Resume of Energy Transactions Average Year

1. Firm Energy	158,000,000 kwh.
2. Secondary Energy	63,800,000 kwh.
Total Output	221,800,000 kwh.
Average Purchases Dump Energy	41,000,000 kwh. per year

It is evident, therefore, that an energy interchange contract can be arranged to interchange the dump energy required and available. For this purpose, it is proposed to build a transmission line to the nearest source of supply which can deliver 20,000 kw. dump energy during off-peak [fol. 7] hours. Provision has therefore been made in the estimates for a transmission line to Davenport, Iowa, where such sources of supply is available.

10. The proposed use or market for the power to be developed is as follows:

It is proposed to develop the ultimate power in this area as the Federal Power Commission will authorize said applicant to so do, in an orderly and progressive manner.

All power produced by the applicant will be made especially available to the non-profit Rural Electrification Cooperative Associations and Cities and Towns who distribute same on the municipal ownership plan. Preference will be given to those purchasing current for distribution who will deliver same without profit or so that the greatest benefits come to the ultimate users of said current.

It is proposed, as a separate project, to construct a transmission grid to be sponsored by a transmission cooperative to supply the various municipalities and rural cooperatives in thirty-five (35) or more counties adjacent to the project.

It is further proposed to interconnect the system with neighboring systems to provide interconnection for the purpose of obtaining off-peak energy for pumped water storage during low flow periods and disposing of surplus available energy.

Further dams, reservoirs and power houses in the watershed of the Cedar River are contemplated as future developments and will be studied, built, maintained and operated as the current or power demands develop and as authorized by the Federal Power Commission.

In the Federal Power Commission Report to the President, July 16th, 1941, recommendations are made as to new [fol. 8] generating facilities required to meet anticipated loads up to 1946. In Region #4 it is recommended that the Moline-Rock Island Manufacturing Company install three additional units of 50,000 kw. each. This will more than double their present installed capacity.

Since applicant's proposed project provides for interconnection with the system of Moline-Rock Island Manufacturing Company and since applicant expects to produce and deliver power at a lower overall cost than the proposed steam plants of the above company, it would seem that the proposed project is a logical alternate for one of the 50,000 kw. units above mentioned.

This report would seem further to bear out applicant's contention as to the urgent need for power facilities in the district to be served by him.

11. The applicant owns no power plants or facilities as it is a newly organized Corporation, except that it has been assigned the properties of the Federal Construction Company of Muscatine, Iowa, consisting of plans, reports,

studies, surveys, build, operate and maintain such project as the Federal Power Commission will license applicant to construct and operate.

12. The applicant desires to make the following of record:

(a) That it is a non-profit cooperative association.

(b) That the project will at no time be sold into private ownership.

(c) That if and when the Federal Government establishes or creates a publicly owned Federal Agency to own, build, and operate Hydro Generating facilities in the district served by applicant for the benefit of the public of the State of Iowa, applicant agrees to make available to the Government of the United States for acquisition and ownership [fol. 9] the properties and facilities of the Cooperative on condition that the proper Federal Agency desiring applicant's property, shall assume the outstanding indebtedness of its (the applicant's) properties and assure all public agencies and non-profit cooperatives, dependent upon applicant for supply of electric energy, of at least as favorable terms as they then enjoy with the applicant.

13. The following exhibits are filed herewith and are hereby made a part of this application:

Exhibit "A"—Certificate of Organization and Articles of Incorporation.

Exhibit "B"—Resolution, authorizing application for license, permits, etc.

Exhibit "C"—Statement *re* State Laws Applicable to Project.

Exhibit "D"—Statement *re* Compliance with State Laws.

Exhibit "E"—Statement *re* Water rights.

Exhibit "F"—Statement *re* Land Ownership.

Exhibit "G"—Statement *re* Financing.

Exhibit "H"—Statement re Affect on Stream Flow.

Exhibit "I"—Statement *re* Estimates of Power Available.

Exhibit "J"—General Project Map—Sheet 1.

Exhibit "K"—Statement *re* Details of Project Area.

Sheet 1—Detail of Primary Reservoir, South Half.

Sheet 2—Detail of Primary Reservoir, North Half.

Shet 3—Detail of Canal & Head Bays.

[fol. 10] Exhibit "L"—General Design.

Sheet 1—Division Dam & Spillway.

Shet 2—Profile of Diversion Canal.
Sheet 3—Intake Dam & Power House.
Exhibit "M"—Statement *re* General Description and Specifications.
Exhibit "N"—Statement *re* Estimate of Project Cost.
Exhibit "O"—*Settlement re* Time for Construction.

In Witness Whereof the applicant has caused its name to be hereunto signed by Harry J. Strong, its Secretary.
This Corporation has no Seal,
Signed this 8th day of August , 1941.
First Iowa Hydro Electric Cooperative, /s/ Harry J. Strong, Its Secretary.

[fol. 11] BEFORE FEDERAL POWER COMMISSION

OPINION NO. 110

Project No. 1853

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Appearances:

For the Applicant: Andrew G. Haley, Esquire, Washington, D. C.; Howard P. Eckerman, Esquire, Davenport, Iowa; Ralph A. Thompson, Esquire, Muscatine, Iowa; Irvin Schlesinger, Esquire, Des Moines, Iowa; George B. Porter, Esquire, Washington, D. C.; Herbert G. Thompson, Esquire, Muscatine, Iowa, and Joining in the Brief: John Connolly, Jr., Esquire, Des Moines, Iowa.

For the Federal Power Commission: Willard W. Gatchell, Esquire, Washington, D. C.; W. A. Whittlesey, Esquire, Washington, D. C.

For the Intervenor: State of Iowa: Floyd Philbrick, Esquire, Des Moines, Iowa; G. H. Clark, Jr., Esquire, Ames, Iowa; and Joining in the Brief: John M. Rankin, Esquire, Des Moines, Iowa.

For the Iowa Electric Light and Power Company, Participant: Frank C. Byers, Esquire, Cedar Rapids, Iowa.

For the Iowa-Illinois Gas & Electric Company, Brief Participant: Don Barnes, Esquire, Cedar Rapids, Iowa.

[fol. 12] Representatives of Protestants and of Other Interested Individuals or Organizations: A. A. Couch, Presi-

dent of the State Federation of Labor, a participant on behalf of the Applicant.

For the National Coal Association, Protestant: Marc G. Bluth, Bell Bldg., Chicago, Ill., and James W. Haley, Southern Building, Washington, D. C.

For Northern Illinois Coal Trade Association and Middle States Fuels, Inc., Protestants: A. J. Christiansen, 310 South Michigan Blvd., Chicago, Ill.

For Progressive Mine Workers of America: John P. Madden, Carlinville, Illinois.

For Coal Trade Association of Indiana: Harold V. Scott, Traffic Manager, 632 Cherry St., Terre Haute, Indiana.

For Illinois Coal Traffic Bureau: Harry A. Rozene, 307 North Michigan Blvd., Chicago, Ill.

For Iowa Southern Utilities Company of Delaware, Protestant: Robert Valentine, Centerville, Iowa.

For Order of Railway Conductors, Protestant: W. H. Jeffries, State Legislative Representative.

For Brotherhood of Railroad Trainmen, Protestant: C. G. Brandow, State Legislative Representative.

For Brotherhood of Locomotive Engineers, Protestant: J. W. Snyder.

For Brotherhood of Locomotive Firemen and Enginemen, Protestant: T. L. Tollefson.

[fol. 13] For Iowa Division of the Isaak Walton League of America: Objector: H. C. Beard, Iowa Building, Des Moines, Iowa.

For the Iowa Coal Institute: Hugh W. Lundy, Albia, Iowa, and John M. Drabelle, Cedar Rapids, Iowa.

For District 13 - Iowa, United Mine Workers: Dave Crowe, Albia, Iowa.

For Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company: A. B. Howland, 500 Bankers Trust Bldg., Des Moines, Iowa.

For American Telephone & Telegraph Company: P. C. Elvis, Chicago, Illinois.

For Iowa State Highway Commission: Fred R. White, Chief Engineer and G. H. Clark, Jr., General Counsel.

For Iowa State Conservation Commission: Objectors: Fred Schwob, Dr. R. M. Bailey, and E. B. Speaker, of the Commission; Fred Poyneer, Commissioner; Floyd Philbrick, First Assistant Attorney General.

For Iowa State Building and Construction Trades Council: P. R. Ferris, G. A. Elliott, and G. A. Baldus.

For 97 Farmers Living Adjacent to Proposed Site: George Corriell.

[fol. 14] OPINION

By the Commission:

This matter is before us upon an application filed on August 11, 1941, by First Iowa Hydro-Electric Cooperative for a license under the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Muscatine and Cedar Counties, Iowa, and extending to the Mississippi River north of Muscatine. Supplements to the application have been filed to modify the project in certain particulars.[1]

The Project

The project as now proposed would consist of an 8,300-foot dam across the Cedar River approximately 21 miles upstream from its confluence with the Iowa River, with a 15,000-foot dike on the western bank of the river; a reservoir of aproximately 11,000 acres; a diversion canal leading from the main reservoir in a southeasterly direction to a reservoir created by construction of a dam across Mad Creek, an additional length of canal from the Mad Creek reservoir to a small reservoir or forebay created by the construction of a dam across Geneva Creek; a powerhouse having four turbo-generating units with an aggregate

[1] Additionally, the Cooperative filed a declaration of intention (Docket No. D1-154) in January, 1940, for a run-of-river hydroelectric development to be located on the Cedar River at about the same location as the presently proposed development, but not extending to the Mississippi River, and in April, 1941, this was supplemented to incorporate many of the features found in the present application. After an investigation, in the course of which the Governor of the State of Iowa was invited to present his views, the Commission on June 3, 1941, found that the Cedar River and the Iowa River, into which it flows, are navigable waters of the United States, and that the interests of interstate commerce would be affected by the proposed construction.

generating capacity of 70,000 horse-power, together with appurtenant structures; and a discharge canal approximately 6,000 feet long running parallel to the Mississippi River and discharging into the pool immediately below United States Dam No. 16 near Muscatine. The main [fol. 15] reservoir on the Cedar River would flood certain islands to which title is held by the United States.

As first presented, the plans of the applicant for developing the water resources of the Cedar River were neither desirable nor adequate, but many important changes in design have been made.[2] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.

Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the Act.

The Legal Issue Posed

The State of Iowa (through its Attorney General) was granted leave to intervene in this proceeding and contends that the applicant has failed to comply with the require-

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[2] Section 10(a) of the Act provides:

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

ments of Section 9(b)[3] of the Federal Power Act in that [fol. 16] it has not obtained the approval of the State Executive Council of Iowa for construction of the project.

Section 9(b) of the Act requires that, before issuing a license, the Commission must be satisfied that the applicant has compiled with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license.

It is pointed out by the State that Section 7767 of Chapter 363 of the 1939 Iowa Code provides that no dam shall be constructed "in any navigable or meandered stream for any purpose, or in any other stream for power purposes, unless a permit has been granted by the Executive Council * * *." Section 771 further provides that the State Executive Council shall grant such permit if certain conditions are met, among which is a requirement that "any water taken from the stream in connection with the propect is returned thereto at the nearest practicable place without being materially diminished in quantity * * *."

The applicant has not applied for a permit from the State Executive Council with respect to the project as now proposed and contends that it is not required to obtain such permit in order to satisfy the requirements of Section 9(b) of the Federal Power Act. In support of this contention, the applicant asserts that since this project involves the diversion of water from the Cedar River to the Mississippi

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[3] Sec. 9. That each applicant for a license hereunder shall submit to the Commission * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act. (See also Section 27 of the Act.)

River, the conditions of Section 7771 of the Iowa Code cannot be met and the Council would be unable to issue a permit for this project. The applicant further contends that [fol. 17] the Iowa statute is invalid insofar as it would preclude the construction and operation of the project because the statute represents an undue interference by a State with the exercise of the Federal Government's authority over navigable waters of the United States.

Conclusion

We have given careful consideration to the conflicting contentions of the applicant and the State of Iowa with respect to the applicability and effect of the Iowa statutes in this proceeding. But, as previously indicated, we are bound by the requirements of Section 9(b) of the Federal Power Act, which provides for submission to the Commission of satisfactory evidence that the applicant has complied with the State laws. The appropriate place for a determination of the validity of such State laws is in the court and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9(b), applicant may seek review of our action and its contentions under Section 313(b) of the Federal Power Act.

An appropriate order in accordance herewith will be issued.

Leland Olds, Chairman, Claude L. Draper, Commissioner, Basil Manly, Commissioner, John W. Scott, Commissioner, Nelson Lee Smith, Commissioner.

Dated at Washington, D. C., this 29th day of January, 1944.

Leon M. Fuquay, Secretary.

[fol. 18] BEFORE FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Nelson Lee Smith.

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Project No. 1853

ORDER DISMISSING APPLICATION FOR LICENSE—January 29, 1944

Upon application filed August 11, 1941, as later supplemented, by First Iowa Hydro-Electric Cooperative, with offices in Muscatine and Davenport, Iowa, for license under the Federal Power Act for a proposed power project to be located on the Cedar River in Muscatine and Cedar Counties, Iowa, and extending to the Mississippi River north of Muscatine;

For the reasons given, and the facts found in Opinion No. 110 adopted this date and made a part hereof by reference, the Commission *finds* that:

The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice; [fol. 19] It is *ordered* that:

The pending application filed August 11, 1941, as supplemented, be and it is hereby dismissed without prejudice to renewal within one year upon satisfying the requirements of Section 9(b) of the Federal Power Act.

By the Commission.

Leon M. Fuquay, Secretary.

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Project No. 1853

APPLICATION FOR REHEARING

Comes now First Iowa Hydro-Electric Cooperative, Applicant in the above entitled matter, by its attorneys, and pursuant to Section 313(a) of the Federal Power Act,

states that it is a person aggrieved by the Order of the Commission dated January 29, 1944, dismissing the application for license, and makes this application for rehearing. As grounds therefor, Applicant states:

1. On January 29, 1940 Applicant, First Iowa Hydro-Electric Cooperative, filed its declaration of intention, pursuant to Section 23(b) of the Federal Power Act, to construct a project on the Cedar River in the State of Iowa. On April 2, 1941, supplemental documents further describ- [fol. 20] ing the project were filed. On June 3, 1941 the Federal Power Commission issued its Opinion and Order incorporated herein by reference, in which the Commission found that the Cedar and Iowa rivers are navigable waters of the United States, that the interests of industry and commerce would be affected by construction of the project, that public lands of the United States would be affected, and that a license for the construction of the project proposed was required under the provisions of the Federal Power Act. This decision and order of the Federal Power Commission, though due and lawful notice thereof was served upon the State of Iowa by the Commission, was not objected to or appealed from by the State. Pursuant to the Order of June 3, 1941, Applicant, on August 11, 1941, filed its application for license. Publication of the filing of said application was duly made, and the statutory notices served. On October 14, 1941, a hearing upon the application was ordered, and was subsequently held at Davenport, Iowa, commencing on January 12, 1942, and concluding on January 28, 1942. Upon appropriate petition thereafter filed on April 7, 1942, the Commission ordered a further hearing which was held in Chicago, Illinois, May 18 to May 20, 1942, inclusive. The case was fully briefed by applicant, and by parties who had been permitted to intervene or participate in the proceedings, and by counsel for the Federal Power Commission.

2. On January 29, 1944, the Commission entered its final order dismissing the application of the First Iowa Hydro-Electric Cooperative for license. The *sole* reason given for such dismissal, as stated in the Order and Opinion concurrently issued, was that the Applicant had not presented satisfactory evidence under Section 9(b) of the Federal Power Act, that it had complied with applicable laws of the State of Iowa "requiring a permit from the State Executive

[fol. 21] Council to effect the purposes of a license under the Federal Power Act". This finding is arbitrary and capricious *in that* it is not supported by any evidence. Applicant, on the contrary, has submitted cogent evidence within the purview of Section 9(b) of the Federal Power Act that it has complied with all applicable laws of the State of Iowa, and a finding should be made accordingly. But for the reason stated by the Commission, *i. e.*, the jurisdictional question, there can be no doubt that Applicant would be entitled to the issuance of a license, as the Commission found (p. 6, Commission's Opinion) that the Applicant had agreed to certain minor modifications proposed by the Chief of Engineers of the War Department, and that "the present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable."

3. The navigability of the Cedar and Iowa Rivers is not in issue. The order of the Federal Power Commission of June 3, 1941 became final and absolute upon the entry of such order, and the failure of any person, or the State of Iowa to take an appeal therefrom, lawful and statutory notice, having been served as to the entry of such order. When this order became final the jurisdiction and authority of the Federal Power Commission, as contained in Sections 4 and 23 in particular and in other sections of the Federal Power Act, became definite, absolute, final and exclusive.

4. Whatever jurisdiction and authority existed in the State of Iowa and its Executive Council prior to June 3, 1941, under Chapter 363 of the Iowa Code of 1939, ceased upon the assumption of jurisdiction by the Federal Power Commission under its order of June 3, 1941.

[fol. 22] 5. If the Acts of Congress of May 6, 1870 (61 Stat. 121) and August 18, 1894 (28 Stat. 356) may be so construed as to have relinquished the jurisdiction of the Federal Government over the stream in question, which Applicant does not concede, the Congress again assumed complete jurisdiction in the passage and approval of the Federal Power Act of 1920. And it should be noted that

Section 29 thereof provides for repeal of all acts or parts thereof inconsistent with such Act.

6. The Applicant has satisfied the requirements of Section 9(b) of the Federal Power Act in that Sections 7767, 7771, 7776 of Chapter 363, Iowa Code 1939, are inapplicable to waters of the United States as distinguished from waters of the State. Therefore, upon passage and approval of The Federal Power Act and or after the entry of the Commissioner's Order of June 3, 1941, the requirements of the Iowa Code for obtaining a permit from the State Executive Council for the construction, operation or maintenance of a dam over the stream in question became inapplicable; the prior trusteeship of the State ceased to exist. Furthermore, the jurisdiction of the Federal Government over the navigable waters of the United States, insofar as the licensing of power projects is concerned, is exclusive in nature and requires a uniform rule of regulation. To interpret Section 9(b) of the Federal Power Act as requiring compliance with Chapter 363 of the Iowa Code would, therefore, be to render said Section unconstitutional. However, it is a well established principle of statutory interpretation, that if two interpretations of a statute are possible, one of which would render it constitutional and the other unconstitutional, that interpretation which renders the law valid will be assumed to be the one intended by the legislature. Therefore, Section 9(b) of the Federal Power Act must be interpreted so as not to relinquish the exclusive jurisdiction of the [fol. 23] Federal Government in this field. Even if applicable, the Iowa statute presents a clear cut conflict of jurisdiction, and upon the assumption of jurisdiction by the Federal authority the inconsistent or conflicting statute of the State must give way to the assumption of Federal jurisdiction lawfully delegated to the Congress by the Commerce Clause of the Constitution. Insofar as the State statute may authorize the State to take the same or concurrent action as the Federal Power Commission may take under the Federal Power Act, the State statute must be held unconstitutional in such respects. The Commission has thus exceeded its statutory authority in attempting to require compliance with an unconstitutional law (Chapter 363, Iowa Code, 1939).

7. When Section 9(b) of the Federal Power Act is construed in connection with other provisions of the Act, par-

ticularly Sections 4, 10(a), and 23 thereof, it must be concluded that the power and authority conferred upon The Federal Power Commission is not subservient to or repealable by an individual state. Nowhere in Section 4 is there a limitation upon the authority of the Federal Power Commission over navigable waters of the United States. Section 23(b), in providing that a license must be obtained from the Commission before the construction of a dam on streams other than those defined a navigable waters, if the interests of interstate commerce will be affected, and in providing also that dams may be constructed on such streams without license if the Commission finds that interstate commerce is not thereby affected, upon compliance with state laws, is a clear indication that Section 9(b) is to be construed so as not to require a state permit in a case where the Commission has finally determined navigability and that interstate commerce will be affected.

[fol. 24] 8. The provision of Chapter 363 of the Iowa Code of 1939 requiring a permit from the State of Iowa, even if held applicable under Section 9(b) of the Federal Power Act, does not provide for a judicial proceeding before any court or commission empowered to determine whether a license or permit shall issue. On the other hand, the issuance of a permit is lodged solely with the discretion of an "executive council" composed of the Governor of the State and certain administrative or executive officials. The statute is therefore unconstitutional in that an applicant is not afforded due process by reason of the absence of a judicial proceeding and right of review by a Court of law. Thus, if held applicable, executive fiat of a single state can supplant, thwart, or repeal the authority of the Commission to grant or refuse licenses after judicial proceeding.

9. The primary objectives of the Federal Power Act are navigability, flood protection, watershed development, and recovery of the costs of improvements through utilization of power. The Commission has misinterpreted the requirements of Section 9(b) with the result that the foregoing objectives are entirely defeated. This has been done with full knowledge on the Commission's part of the State's position that in no event would the State Executive Council issue a permit to the Applicant even if the Applicant attempted to comply with the obviously inapplicable local

statutes, which position violates statutory and constitutional rights of the Applicant.

Wherefore, in view of the foregoing, it is respectfully prayed that the Commission reconsider and set aside its action of January 29, 1944 in dismissing the application for license, and upon such reconsideration order issuance [fol. 25] of the license, or that the Commission enter its order granting a rehearing.

Respectfully submitted, First Iowa Hydro-Electric Cooperative, by George B. Porter, Porter and Haley, 1101 Earle Building, Washington, D. C.

—— ——, Of counsel for First Iowa Hydro-Electric Cooperative.

Duly sworn to by George B. Porter. Jurat omitted in printing.

[fol. 26] CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing application for rehearing by mailing a copy thereof properly addressed to the following persons of record in this proceeding:

William W. Gatchell, Esquire,
Federal Power Commission,
Washington, D. C.;

Honorable Floyd Philbrick,
First Assistant Attorney General of Iowa,
Des Moines, Iowa;

Frank C. Byers, Esquire,
Iowa Electric Light and Power Company,
Cedar Rapids, Iowa;

Don Barnes, Esquire,
Iowa-Illinois Gas and Electric Company,
Cedar Rapids, Iowa.

Dated at Washington, D. C., this 29th day of February, 1944.

George B. Porter.

—— ——, of counsel for Iowa Hydro-Electric Cooperative.

[fol. 27] BEFORE FEDERAL POWER COMMISSION

Commissioners:

Basil Manly, Acting Chairman, Claude L. Draper, John W. Scott and Nelson Lee Smith. Leland Olds not participating.

Project No. 1853

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

ORDER DENYING APPLICATION FOR REHEARING—March 7, 1944

Upon application filed February 29, 1944, by First Iowa Hydro-Electric Cooperative for rehearing and reconsideration of the Commission's order of January 29, 1944, dismissing the application for license for Project No. 1853; and

It appearing that the application for rehearing does not advance any arguments in support of the applicant's position which were not previously advanced in its briefs and considered by the Commission in the order of January 29, 1944;

The Commission *finds* that no useful purpose would be served by granting the petition for rehearing, and that reconsideration of the order of January 29, 1944, dismissing the application for license would not be appropriate.

It is *ordered* that the application for rehearing be and it is hereby denied.

By the Commission.

J. H. Gutride, Acting Secretary.

[fol. 28] BEFORE FEDERAL POWER COMMISSION

* * * * * * *

RALPH THOMPSON, called as a witness on behalf of the applicant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. H. G. Thompson:

Q. What is your name?

A. Ralph Thompson.

Q. Where do you live?
A. Muscatine, Iowa.
Q. What is your profession or calling?
A. Attorney at law.
Q. How long have you practiced law?
A. Since 1903.
Q. Where have you practiced?
A. Muscatine, Iowa.
Q. In what branch of the practice?
A. General practice.
Q. Do you know Harry J. Strong?
A. I do.
Q. Do you know what position, if any, he holds with the First Iowa Hydro-Electric Cooperative?
A. I do.
Q. What position?
A. Secretary, and a member of the Board of Directors.
Q. Did you know him in March of 1941?
A. I did.
Q. Did he, as an officer or a director, and Secretary, of the First Iowa Hydro-Electric Cooperative, call on you with respect to an opinion with regard to the inapplicability of or the applicability of the statutes of Iowa in regard to an application to be filed with the Federal Power Commission for a license to construct the project now under consideration?
A. Yes, he did.
Q. And did you give him an opinion as to the law at that time?
A. I did.
Q. And what did you say, or what opinion did you render to him at that time?

Mr. Philbrick: That is objected to, if the Trial Examiner please, as being an opinion and conclusion of the witness, and while the witness may be qualified to give an opinion [fol. 29] and conclusion on the matter by reason of his profession, nevertheless it is wholly irrelevant and immaterial and is not a proper method of proof as to compliance with the laws of the State of Iowa; and furthermore, it seeks to have the witness express as an opinion and conclusion one of the ultimate questions to be determined by the Examiner and the Commission.

Trial Examiner: I don't think that is the case here. I think that Mr. Philbrick overlooks the fact that the question here is not what the opinion of Mr. Thompson presently is, but what the opinion was which he gave to the Co-operative.

Mr. Philbrick: Which would be irrelevant and immaterial to any issue here.

Trial Examiner: That may be. However, we will admit it and determine that later.

Mr. H. G. Thompson: What did you advise Mr. Strong in that respect?

Mr. Philbrick: The same objection as last made.

Trial Examiner: The objection is overruled.

Mr. Philbrick: May we have an exception on this, please?

Trial Examiner: Exception will be noted for the State of Iowa.

The Witness: In March, 1941, upon an investigation of the Federal and State laws, I advised Mr. Strong that in the event the Federal Power Commission took jurisdiction of the Cedar River, that the provisions of Chapter 363, Iowa Code, 1939, and other state statutes, requiring a permit for the construction of a dam in meandered navigable waters, would not be applicable to the proposed project under the provisions of the Federal Power Act.

[fol. 30] Mr. Philbrick: We now move to strike the answer for the reason that it is wholly irrelevant and immaterial to any issue in this case.

Trial Examiner: For the purpose stated, the motion is refused.

By Mr. H. G. Thompson:

Q. Do you propose to file with the Federal Power Commission a brief and argument in regard to the State and Federal law appertaining to the legal opinion and advice that you gave Mr. Strong, and as just stated by you?

Mr. Philbrick: That is objected to as being wholly irrelevant and immaterial. It can be of no probative value to the determination of any issue in this cause.

Trial Examiner: I don't think this answer would be material. I think the only question that is here is as to whether compliance was made, and as to whether it was done on the advice of counsel, which was the purpose that I understood this witness was offered for. The future

intention as to filing a brief can just as well be stated by counsel and not by sworn testimony.

Mr. H. G. Thompson: The question will come up on cross-examination, and we don't want to conduct any college of law on the law questions involved in this matter, at this hearing at least. We don't want any debate on the law between the witness and counsel for the state or counsel for the Government, and he proposes to file his brief and argument with the Federal Power Commission, who are entitled to his reasons and the reasons why the Cooperative followed his advice.

Trial Examiner: I don't think this is material here, Mr. Thompson. I think he may make a statement that will [fol. 31] have just the same weight as if made on the stand, to that effect.

Mr. H. G. Thompson: Well, on behalf of the Co-operative I say to this Commission that we propose to file with the Federal Power Commission a brief and argument of the law covering this phase involved in this hearing, as to the applicability of the State statutes of Iowa that have been introduced in evidence here as Exhibit No. 67.

Trial Examiner: It will be so noted.

Mr. H. G. Thompson: You may cross-examine.

Trial Examiner: Are there any questions, Mr. Gatchell?

Mr. Gatchell: Yes, I have one question.

Mr. H. G. Thompson: Will you pardon me. I do want to ask a couple of other questions.

Trial Examiner: All right.

By Mr. H. G. Thompson:

Q. Are you acquainted with the territory in and about the area covered by this project?

A. I am.

Q. And are you acquainted with the area down to the mouth of the Cedar River in Muscatine County?

A. I am.

Q. Do you know whether there are any dams or other water rights within the area or below the diversion dam to the mouth of the Cedar River?

Mr Philbrick: That is objected to as irrelevant and immaterial and for the further reason that it is incompetent, there having been no showing of the qualifications of the

witness to testify as to what, if any, water rights there might or might not be there; and it calls for the opinion and conclusions of the witness; and can have no probative value.

Trial Examiner: Will counsel state the purpose of that inquiry?

[fol. 32] Mr. Gatchell: I suggest, Mr. Trial Examiner, that the applicant is required to file, as Exhibit E, the Nature and Extent and ownership of water rights which the applicant proposes to use in the development of the project covered by the application. The pending question would go to whether there are any other rights to be acquired. Therefore, it would be pertinent with respect to the inquiry here.

Mr. Philbrick: I would say that should properly have been a part of their main case, and even this is not the proper method of proof.

Trial Examiner: I think that there has been nothing to show yet counsel's familiarity with it, and I don't think we can assume, from the fact that he is one of several counsel, that he made an investigation of this fact, Mr. Thompson.

Mr. H. G. Thompson: I asked him if he was familiar and whether he knew.

Mr. Gatchell: He is an attorney——

Trial Examiner (interposing): That is a combination of two questions.

Mr. H. G. Thompson: We will not debate it.

By Mr. H. G. Thompson:

Q. I will ask you further, Mr. Thompson, have you made any investigation of the public records of Muscating County, including the plat book showing the ownership of lands within the county, and from a personal inspection of the Cedar River can you state whether there are any dams or other water rights within the area of this project, or the Cedar River to its mouth, in Muscatine County?

A. I made that examination.

Mr. Philbrick: I make the same objection.

Trial Examiner: The objection is overruled; I will permit the answer.

[fol. 33] By Mr. H. G. Thompson:

Q. And did you find any dam in the Cedar River, or any water rights within the project or in the Cedar River within the boundaries of Muscatine County?

Mr. Philbrick: The same objection as last made, and also the question calls for secondary evidence and can be of no probative value as to what water rights might be involved. The question is general, as to water rights.

Trial Examiner: I think the witness may answer this question. The objection is overruled; exception will be noted for the State of Iowa.

The Witness: From my examination of the records I found no such grants, and from the physical examination of the river from the point you mentioned, there is no existing dam or other rights.

Mr. Philbrick: I move to strike the first part of the answer for all the reasons stated in my objection.

Trial Examiner: The motion is refused; exception will be noted for the State of Iowa.

By Mr. H. G. Thompson:

Q. Have you made any investigation as to whether, within the area in question, or the Cedar River from this project down to its mouth, whether there is any irrigation, ditches, or municipal water rights involved?

A. I did.

Q. And did you find any such?

A. I found no such.

Mr. Philbrick: That is objected to for all the reasons previously stated, and we move to strike the answer for the same reasons, not having had an opportunity to make an objection before the question was answered.

Trial Examiner: The objection is overruled, and to save time we will rule against the motion also. Exception will be noted for the State of Iowa.

[fol. 34] By Mr. H. G. Thompson:

Q. I will ask you if, within the area of this project or along the Cedar River to its mouth, whether you made an investigation as to whether there is any state park or public lands or public preserves?

Mr. Philbrick: That is objected to for all the reasons last stated. I won't take the time, unless the Trial Examiner desires me to, to repeat the objection.

Trial Examiner: I don't think it is necessary to repeat the objection. I am not sure that this is material. However, we will permit the question and consider the importance of it later. This is not a jury trial.

The Witness: I made such an investigation.

Mr. H. G. Thompson: Did you find any public parks, state parks, public lands or preserves of the State of Iowa in any of the area of this project, or along the Cedar River to its mouth?

Mr. Philbrick: The same objection.

Trial Examiner: The objection will be overruled.

The Witness: I did not.

Mr. H. G. Thompson: And is there any such existing?

Mr. Philbrick: The same objection.

Trial Examiner: The objection will be overruled.

The Witness: There are no such.

Mr. H. G. Thompson: Take the witness.

Trial Examiner: You may cross-examine, Mr. Gatchell.

Cross-examination.

By Mr. Gatchell:

Q. You stated that you advised Mr. Strong that there were no state laws requiring compliance by this applicant in so far as concerns the filing of an application with the [fol. 35] Federal Power Commission for this proposed project?

A. That is correct?

Q. Are you of the same opinion today?

A. I am.

Mr. Gatchell: No further questions.

Trial Examiner: Any questions, Mr. Philbrick:

Cross-examination.

By Mr. Philbrick:

Q. Did you make any examination as to whether there were any public highways that might be affected?

Mr. H. G. Thompson: Objected to as immaterial and irrelevant. Public highways are not public lands within the

meaning of the Federal Power Act, or the statutes of the State of Iowa.

Trial Examiner: To save time we will permit the witness to answer the question.

The Witness: Yes, I know all about the public highways down there. I travel them every day, nearly.

By Mr. Philbrick:

Q. There are quite a number of them, aren't they?

A. Oh, the average throughout the State; not so many in that area, though; not any there.

Q. Did you make any examination from the mouth of the Cedar to the mouth of the Iowa?

Mr. H. G. Thompson: Objected to as incompetent, irrelevant and immaterial and not proper cross examination. The Iowa River and its environs is not involved in this hearing.

Mr. Philbrick: Well, Mr. Nash gave some testimony about the Iowa River.

Trial Examiner: I think this is certainly not responsive to any direct examination of this witness. I think I will have to sustain the objection, Mr. Philbrick.

[fol. 36] By Mr. Philbrick:

Q. Are there any cemeteries along the Cedar in that vicinity, or anywhere along the Cedar, that would be affected by this project?

Mr. H. G. Thompson: Objected to as incompetent, irrelevant and immaterial, unless they are affected by this project.

Trial Examiner: I understood that to be a part of the question.

Mr. H. G. Thompson: You would have to assume it because he didn't say it.

Mr. Philbrick: Yes I did.

Trial Examiner: With that amendment as now made, we will permit the question to be answered.

The Witness: There is a cemetery at Moscow, but I don't think it is affected by this project, and that isn't a public preserve such as mentioned in the statute.

By Mr. Philbrick:

Q. You wouldn't be sure that it wasn't affected by the project, would you?

A. It isn't affected by this project in that it isn't a state or a national preserve. It is either a private or a municipal cemetery, and doesn't come within the province of the Act.

Q. It is a public cemetery, however?

A. Not State or National.

Mr. Philbrick: I think that is all.

Mr. Gatchell: No further questions.

Trial Examiner: Is there any redirect?

Redirect examination.

By Mr. H. G. Thompson:

Q. You know that any of the cemeteries located at Moscow or others here are outside of the lines of this project?

Mr. Philbrick: That is objected to; counsel can't cross-examine his own witness——

[fol. 37] Trial Examiner (interposing): I think the form of the question is objectionable, Mr. Thompson.

By Mr. H. G. Thompson:

Q. Did you find any cemeteries of any nature within the confines of this project, that would be affected by the building of this project?

A. I did not.

Q. And do any exist?

A. No, there are none existing.

Mr. H. G. Thompson: You are excused.

Trial Examiner: There is no re-cross, I presume?

Mr. Gatchell: No, sir.

Mr. Philbrick: No questions.

Trial Examiner: As I understand, that completes your request?

Mr. H. G. Thompson: There was some general testimony here offered by the professor from Iowa City, I forget his name, that the building of artificial dams was very injurious to fish life——

Trial Examiner (interposing): I don't understand that that is material here. The question I asked was this. You

asked for the right to substitute a witness of your own at the present time, and that is completed; you have nothing further on that, I take it?

Mr. H. G. Thompson: That is right, that will be all at this time.

* * * * * * * * *

[fol. 38] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, a Non-Profit Cooperative Association, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

PETITION FOR REVIEW—Filed May 5, 1944

To the Honorable, the Judges of the United States Court of Appeals, for the District of Columbia:

First Iowa Hydro-Electric Cooperative, a non-profit cooperative association, Petitioner, files its petition under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825 l, Title 2 of the Public Utility Act of 1935 approved August 26, 1935, amending the Federal Water Power Act, approved June 10, 1920, 41 Stat. 1063, 16 U. S. C. 791-823) against the Federal Power Commission, hereinafter designated as Respondent or the Commission, to review and set aside an order entered by it on the 29th day of January, 1944, and thereupon shows unto the Court the following:

1. Petitioner is a non-profit cooperative association, organized under the laws of the State of Iowa, by a group of farmers and other persons interested in cooperative ownership and distribution of electric power on a non-profit basis. On January 29, 1940 Petitioner filed with the Federal Power Commission its declaration of intention pursuant to Section 23 (b) of the Federal Power Act *supra* [fol. 39] to construct a hydroelectric power project utilizing the waters of the Cedar River (which has its source in the

State of Minnesota and flows through Iowa) and the Mississippi River. On June 3, 1941, the Federal Power Commission entered an order by which it conclusively determined that navigable waters of the United States are involved, that the interests of industry and commerce would be affected by construction of the project, that public lands of the United States would be affected, and that a license for the proposed construction is required under the provisions of the Federal Power Act. This order of the Respondent, though proper and timely notice thereof was served upon the State of Iowa, became final and absolute and there was no appeal taken therefrom. In accordance with the findings of the Respondent in its aforesaid order of June 3, 1941, Petitioner, on August 11, 1941, filed its application for license for the proposed project including therewith associated exhibits, plans, and specifications of the proposed project as required by the rules of the Commission. Publication of the filing of the application for license was duly made and the statutory notices served. A hearing upon the application was ordered to be held, which hearing commenced in Davenport, Iowa on January 12, 1942, and was concluded on January 28, 1942. Thereafter, and pursuant to appropriate petition, the Commission reopened the proceedings, by order of April 7, 1942, and further hearing was held in Chicago, Illinois, commencing May 18, 1942 and concluding May 20, 1942. The State of Iowa, through its Attorney General, by petition, had been permitted intervention in the proceedings held both at Davenport, Iowa, and Chicago, Illinois. In addition, limited participation was allowed by Respondent to Iowa Electric Light & Power Company and Iowa-Illinois Gas & Electric Company. Upon the conclusion of the hearings, briefs were filed by Petitioner, the State of Iowa, Intervenor, the Iowa Electric Light & Power Company and Iowa-Illinois Gas & [fol. 40] Electric Company as limited participants, and by counsel for the Commission. On January 29, 1944, respondent Commission entered its opinion and order herein complained of dismissing Petitioner's application for license. By said opinion and order, the Commission found, "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be

unreasonable." Notwithstanding such findings on the general merits of petitioner's application for license, the Commission dismissed said application (with leave to renew within one year) upon the sole ground that petitioner failed to comply with Section 7767 of Chapter 363 of the 1939 Iowa Code, which provides that no dam shall be constructed "in any navigable or meandered stream for any purpose, or in any other stream * * * for power purposes, nor shall any such water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council * * *" In its opinion, the Commission stated, "The appropriate place for a determination of the validity of such state laws is in the courts, and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9 (b), applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act." An appropriate application for rehearing, as required by Section 313 (a) of the Federal Power Act *supra*, was filed by Petitioner with the Commission on February 29, 1944, and denied by the Commission by its order entered March 7, 1944.

2. The hydroelectric project proposed by Petitioner in its application, supporting papers and supplement thereto, involves the diversion of water from the Cedar River from [fol. 41] a point approximately eight miles northwest of Muscatine, Iowa, to a point on the bluffs of the Mississippi River about two miles north of Muscatine at which point the water so diverted would be dropped approximately 104 feet through four generating units of a power plant structure and thence emptied into the Mississippi River by means of a tail race a short distance below the generating plant. The main diversion dam would be constructed on the Cedar River at the point about eight miles northwest of Muscatine, and approximately 29 miles above the junction of the Cedar and Iowa Rivers at Columbus Junction, Iowa, and this main dam would create a primary reservoir or lake of approximately 11,000 land acres in area. A diversion canal, beginning at a point near the southeast corner of the primary reservoir, would extend in a general southeasterly direction to a point on the north bank of the Mississippi River at the mouth of Geneva Creek and about two miles above the City of Muscatine, Iowa. At

one point along the route of the diversion canal a dam is required to prevent the discharge of water from the reservoir through a small creek known as Mad Creek, which runs through the City of Muscatine. This dam, referred to as Mad Creek Dam, will create a small reservoir along the course of the diversion canal and this reservoir would have approximately 920 land acres. This reservoir is referred to as the Mad Creek or Secondary Reservoir. At the termination of the diversion canal on the north bank of the Mississippi River at a point where Geneva Creek empties into the Mississippi, a second small dam known as Geneva Creek Dam would be constructed and would form a reservoir of approximately 160 land acres. This reservoir is variously referred to as Geneva Creek Reservoir, the headbay, or the forebay. From the headbay the water so diverted would be dropped through the power plant structure of four turbo-generating units having an aggregate generating capacity of 50,000 kw. Two of these units will [fol. 42] be so designed as to permit the reversal of the turbines, using the generators as motors, for the purpose of pumping water from the Mississippi River back into the headbay and canal above the power house during periods of low water flow when it would be desirable to provide pumped storage of water. The location of Geneva Creek and the proposed power plant structure is a short distance (about 6,000 feet) above War Department Dam No. 16 on the Mississippi River. By constructing a tail race from the power plant along the bank of the Mississippi River to the point on the Mississippi River immediately below Dam No. 16 an additional waterfall of about 10 feet can be secured over and above that which would obtain were the water to be emptied into the Mississippi River directly at the location of the power plant. Yet, if necessary to pump water from the Mississippi River to the headbay of the diversion canal, the water could be pumped directly from the Mississippi River level opposite the power plant, thus gaining for pumpback purposes approximately 10 feet. It is estimated that the hydroelectric plant will be capable of supplying 200,000,000 kw. hours of marketable power per year of which 151,000,000 kw. hours per year will be firm power. Construction of the project will result in the creation of three ideal and badly needed recreational facilities with an aggregate area of approximately 12,000 land acres.

and in a portion of the State of Iowa practically devoid of such facilities.

As stated in Opinion No. 110 of the Respondent, "The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department".

3. Chapter 363 of the 1939 Iowa Code is entitled "Mill Dams and Races", and comprises Sections 7767 through 7796. The provisions raised by the Commission in this case are:

> [fol. 43] 7767: "No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream * * * for power purposes, nor shall any such water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council * * *"
>
> 7771: "If it shall appear to the council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe,".

One other provision is of importance, namely:

> 7776: "The executive council shall investigate methods of construction * * * and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state."

The Commission dismissed the application on the ground that the applicant has not complied with the requirements of Section 9(b), because it has not obtained a permit from the Executive Council under Section 7767. Nowhere in Section 9 (b) is there any inference that a permit must be obtained from the State before the project will be licensed by the Federal Power Commission. If Congress intended that the construction of proposed power projects in navigable waters of the United States must first be licensed by

the various states in which they are to be constructed, it would have said so. The facts that Congress did not require licenses or permits from the states to initiate power projects, and that it did enumerate other requirements that must be complied with, indicates its intent not to require licenses or permits for such purpose.

[fol. 44] The text of Section 23 (b) of the Federal Power Act also shows that it was not the intention of Congress to require licenses or permits from the states to initiate project works. Section 23 (b) provides that a license must first be obtained from the Federal Power Commission before any dam can be constructed on any *non-navigable* stream, if the interests of interstate commerce will be affected by such construction. The section then provides that if the interests of interstate commerce are not affected, "permission is hereby granted to construct such dam or other project works in such stream *upon compliance with state laws.*" (Italics supplied.) Provision is expressly made, therefore, for compliance with state laws when the interests of interstate commerce are not affected. In this case the Commission has determined that commerce is affected by the construction of the proposed project, and there is no issue whatsoever presented by the Commission's opinion and order as to the fact that waters of the United States are involved. By its own expressed terms, Chapter 363 of the 1939 Iowa State Code as stated in Section 7776, can only apply to "the waters of the state."

The description of the project set forth above demonstrates that Section 7771 of the 1939 Iowa Code could not be complied with if effect is to be given to the Federal Power Act. Section 7771 requires that any water taken from the stream in connection with the project must be returned thereto at the nearest practical point. If his mandate were adhered to, it would be impossible "to utilize the head and water available." * Section 10 (a) of the Federal Power Act requires that a license be issued only when

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* Page 46, Federal Power Commission Opinion, No. 110, "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable."

[fol. 45] "in the judgment of the Commission [the project] will be best adopted to a comprehensive plan for improving or developing a water-way or water-ways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Compliance with Section 7771 would defeat the comprehensive plan (approved herein by the Federal Power Commission) for using a water-way for the improvement and utilization of water power development and for recreational purposes. If it is conceded (which we deny) that Section 7771 of the Iowa Code applies to waters of the United States, it becomes perfectly obvious that said section supersedes and renders meaningless the will of Congress and the paramount authority of the Federal Government as expressed in Section 10 (a). Such construction would render the Iowa statute inoperative, invalid, and unconstitutional. And an interpretation of section 9 (b) of the Federal Power Act, which would require compliance with Section 7771 of the 1939 Iowa Code, would be inconsistent with the legislative history of Section 9(b), the rest of the provisions of the Federal Power Act, and the powers of the Federal Government.

Furthermore, if it is assumed that the applicant is required to obtain a license from the State of Iowa in accordance with the provisions of Chapter 363 of the Iowa Code, the following untenable conditions would result: Under Section 7776 the Executive Council is empowered to investigate and approve or disapprove the methods of construction, operation and maintenance of dams. Section 7793 [fol. 46] provides that no permit granted by the Executive Council shall be perpetual, but that it shall be subject to restrictions, cancellation and regulation by legislative action. It is obvious that the provisions of this chapter would place the Executive Council in a position to dictate to a person receiving a permit the type of dam to be constructed. The Federal Power Commission also has supervision over the construction, operation and maintenance of power projects. A situation would thereupon exist in which the

exercise of the powers of the Federal Power Commission, and therefore of the United States, would be dependent upon the action of the state in approving or disapproving the construction of the dam. The entire power program of the Federal Government not only upon the Cedar River and the Mississippi River, but upon any other river in or adjacent to Iowa used for power purposes, would be subject to the control of the state. Certainly such was not the intention of Congress.

4. The opinion and order of the Commission in dismissing petitioner's application for license is arbitrary and capricious, and the applicant is aggrieved and adversely affected in that the Commission failed to find on the basis of testimony of a witness who has practiced law in Iowa for many years, and who is thoroughly familiar with the statute and common law of Iowa, that applicant has complied with all laws of Iowa as required by Section 9 (b).

5. The order of the Commission dismissing the application for license herein is arbitrary and capricious in that the Commission's finding that the applicant has not presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, is not supported by [fol. 47] any evidence and is contrary to law, and the applicant is aggrieved and adversely affected by the order of dismissal based upon said finding.

Petitioner therefore prays that this Honorable Court may review said order and enter a judgment setting said order aside and that such other orders may be made herein as to the Court may seem just.

First Iowa Hydro Electric Cooperative, by (S.) F. A. E. Gillmor, President. Porter & Haley, by (S.) George B. Porter, and (S.) Andrew G. Haley, Counsel for Petitioner.

Duly sworn to by F. A. E. Gillmor. Jurat omitted in printing.

[fol. 48] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jul. 10, 1944. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

MOTION OF STATE OF IOWA FOR LEAVE TO INTERVENE.

To the Honorable, the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

The State of Iowa, one of the sovereign states of the United States of America, moves for leave to intervene in this cause under Rule 38(c) of the General Rules of this Court and shows:

The petitioner herein on or about August 11, 1941, filed before the respondent its petition for a license to construct a hydro-electric project on and near the Cedar River in Muscatine County, Iowa. The proposed project involves the construction of a dam across the said river about twenty-five miles above its confluence with the Iowa River, [fol. 49] the formation of a large reservoir back of the dam and the diversion of the water impounded in the reservoir through a canal into the Mississippi River, and not returning the water to the Cedar River below the dam. Thereafter the State of Iowa filed before respondent its petition to intervene and said petition was granted by the respondent, and the State of Iowa filed its petition of intervention before respondent and did object to the granting of the prayer of petitioner for a license.

That the statutes of the state of Iowa; to-wit, section 7767, Iowa Code 1939, provide as follows:

"No dam shall be constructed, maintained, or operated in this state in any navigable or meandered

stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

That the petitioner, which is a private corporation, made no showing before respondent that it had obtained a permit from the executive council of the state of Iowa, and it had in fact not obtained such a permit.

That the statutes of the state of Iowa, to-wit, section 7771, Iowa Code 1939, provide as follows:

"If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe."

[fol. 50] By reason of said provisions of law and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed.

Section 9(b) of the Federal Power Act (Section 802, Title 16, U. S. C. A.) requires an applicant for license to submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the state within which the proposed project is to be located with respect to bed and banks, and to the appropriation, diversion, and use of water for power purposes.

It is the contention of the state of Iowa that the applicant was not entitled to a license because of its failure to meet the requirements of said section 9(b) of the Federal Power Act, and that the order of the respondent Federal Power Commission, dismissing petitioner's application was correct and should be sustained in this court, and that the petition for review should be dismissed, or in the alter-

native, the order of the respondent Federal Power Commission, should be affirmed.

The State of Iowa, as an intervenor, through its duly constituted instrumentalities, actively resisted the application of petitioner before the respondent throughout the proceedings.

The State of Iowa, through its legislative body, the General Assembly, and by the enactment into law of the statutes of the State of Iowa hereinbefore set out, has declared its public policy with reference to the construction of dams across streams within the borders of the state, for [fol. 51] the protection of its citizens and the preservation of its resources.

The National Congress in the enactment of the Federal Power Act recognized this right of the sovereign states to declare their public policy with reference to streams within their borders, by the provisions of said section 9(b) of said act.

The State of Iowa has a vital interest in the protection of its citizens and preservation of its resources through the operation of its duly enacted laws. The executive council of the state of Iowa has determined that the State of Iowa should intervene herein in order to protect its interests and there is attached hereto copy of the resolution adopted by the said executive council on July 5, 1944.

The State of Iowa, by John M. Rankin, Attorney General of Iowa; Floyd Philbrick, First Assistant Attorney General of Iowa.

[fol. 52] (Copy of resolution adopted by the Executive Council of the State of Iowa on July 5, 1944.)

Whereas, on August 11, 1941, the First Iowa Hydro-Electric Co-operative filed before the Federal Power Commission a petition for license to construct a hydro power project on and near the Cedar River in Muscatine County, Iowa, which on filing was designated by the Federal Power Commission as Project No. 1853, and thereupon on petition by it, the State of Iowa was granted the status of an intervenor therein, and

Whereas, the Federal Power Commission thereafter dismissed the petition for license and the First Iowa Hydro-Electric Co-operative has now filed in the United States Court of Appeals for the District of Columbia a petition against the Federal Power Commission asking for a review

of the said order of the Commission which dismissed the petition for license, and

Whereas, it is vital to the interests of the State of Iowa that the said order of the Commission be sustained,

Be It Resolved by the Executive Council of the State of Iowa that the State of Iowa should intervene in the matter before the said United States Court of Appeals for the District of Columbia and thereby take steps to sustain the said order of the Federal Power Commission, and the Attorney General of Iowa is directed to take such steps as may be appropriate to intervene in said matter in the United States Court of Appeals for the District of Columbia for the purpose of protecting the interests of the State of Iowa.

[fol. 53] CERTIFICATION OF SERVICE

STATE OF IOWA,
Polk County, ss:

I, Floyd Philbrick, being first duly sworn, on my oath depose and say: that I am First Assistant Attorney General of the State of Iowa; that the attached Motion of State of Iowa for Leave to Intervene has been served by mailing a true copy thereof by registered mail as follows:

1. On the First Iowa Hydro-Electric Co-operative, petitioner, by such mailing to Porter & Haley (of record counsel for petitioner), Earle Building, Washington, D. C.

2. On the Federal Power Commission, Respondent, by such mailing to the Federal Power Commission, Washington 25, D. C., attention Mr. J. H. Gutride, Acting Secretary,

said mailings being made on the 6th day of July, 1944, from Des Moines, Iowa.

Floyd Philbrick.

Subscribed and sworn to before me this 6th day of July, 1944.

Oscar Strauss, Notary Public in and for the County of Polk, State of Iowa.

[fol. 54] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sep. 30, 1944. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA—April Term, 1944

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

Before: Groner, C. J., and Edgerton and Arnold, J.J.

ORDER

On consideration of the motion of the State of Iowa for leave to intervene in the above-entitled case, and of petitioner's objections, and the answer thereto, It is.

Ordered by the Court that the State of Iowa be, and it is hereby, allowed to intervene in this cause, and may file a brief within 20 days.

Per CURIAM:

Dated September 30, 1944.

[fol. 55] Friday, February 23rd, A. D., 1945

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, and Honorable Harold M. Stephens, Justin Miller, Henry W. Edgerton and Thurman Arnold, Associate Justices.

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller and Thurman Arnold, Associate Justices.

Proclamation being made, the Court is opened.

January Term, 1945

No. 8752

First Iowa Hydro-Electric Co-operative, Petitioner,

vs.

Federal Power Commission, Respondent, State of Iowa, Intervenor

On motion of Mr. C. Walter Harris, Mr. Neill Garrett, a member of the Bar of the Supreme Court of Iowa, was permitted to argue for the intervenor pro hac vice by special leave of Court.

Argument commenced by Mr. George B. Porter, attorney for petitioner, continued by Messrs. Howard E. Wahrenbrock, attorney for respondent, and Neill Garrett, attorney for intervenor, and concluded by Mr. George B. Porter.

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[fol. 56] [Stamp:] United States Court of Appeals, for the District of Columbia. Filed Aug. 13, 1945. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent, STATE OF IOWA, Intervenor

On Petition for Review of Order of the Federal Power Commission, Decided August 13, 1945

Mr. George B. Porter, with whom *Mr. Andrew G. Haley* was on the brief, for petitioner.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Charles F. Shannon*, General Counsel, *Willard W. Gatchell* and *L. W. McKernan*, Principal Attorneys, Federal Power Commission were on the brief, for respondent.

Mr. Neill Garrett of the Bar of the Supreme Court of Iowa, *pro hac vice*, by special leave of Court, with whom *Messrs. John M. Rankin* and *Horace L. Lohnes* were on the brief, for intervenor, State of Iowa. *Mr. C. Walter Harris* also entered an appearance for State of Iowa.

Before Groner, Chief Justice, and Miller and Arnold, Associate Justices.

MILLER, Associate Justice:

Petitioner applied to the Federal Power Commission for a license to construct a power project on Cedar River in the State of Iowa. The Commission dismissed the application for the reason that, "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act,[1] of compliance with the requirements of appli-

[1] 16 U. S. C. A. §802: "Each applicant for a license under this chapter shall submit to the commission * * * (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within

cable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act * * *."

On this appeal petitioner admits that it failed to secure a permit from Iowa and contends that it would have been futile to apply for one. The general rule is that administrative remedies must be exhausted before judicial review can be availed of.[2] "One who is required to take out a license will not be heard to complain, in advance of applica- [fol. 57] tion, that there is danger of refusal * * *. He should apply and see what happens."[3]

To escape the operation of this rule, petitioner argues, in the alternative, that: [1] no applicable Iowa law requires one in its position to secure a permit; [2] if the Iowa law[4]

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which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

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[2] Red River Broadcasting Co. v. Federal Communications Commission, 69 App. D. C. 1, 3, 98 F. (2d) 282, 284, and authorities cited, n. 3.

[3] Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608, 616-617; see also Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123.

[4] The two Sections of Chapter 363 of the Iowa Code (1939), here in dispute, read as follows:

Section 7767—"No dam shall be constructed, maintained, or operated in this state in any *navigable* or meandered stream for *any* purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same." [Italics supplied.]

Section 7771—"If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing *navigation*, or materially affect other public rights, will not endanger life or public health, *and any water taken from the stream in connection with*

means what its officials contend, then the law is unconstitutional, and compliance cannot be required. In support of its first proposition, petitioner says that the Iowa Code Sections relied upon by the Commission are not state laws contemplated by Section 9(b) of the Power Act, because by their very terms the authority of the State Executive Council is limited to waters of the State; and because they do not prohibit diversion of water for *power* purposes, but only for *industrial* purposes. Conceivably, Iowa might say that its Legislature intended to speak only of waters navigable according to state classification, although not navigable under Federal classification.[5] While this is a possible interpretation and one which the State might adopt concerning the streams here involved—especially if it were necessary to do so in order to avoid the challenge of unconstitutionality—we are unable to adopt it, in the absence of a decision to that effect by the Iowa courts. Each of the disputed Sections speaks in terms of *navigable* waters. In view of the fact that both State and Federal governments may legislate concerning such waters—each in its own appropriate sphere—we see no reason to give to Chapter 363 the narrow interpretation for which petitioner contends. Again, Section 7771 makes no distinction between power projects and industrial purposes. Its reference to diversion is general rather than special; in fact, it could be just as well argued that the State Legislature was speaking, in this Section, primarily of diversion for power production. Moreover, it can hardly be seriously urged that the State Legislature was concerned over industrial pollution of its streams—because of the probable injurious effect upon public health and destruction of fish and other wild life—while, at the same time, unconcerned over the possible results of complete diversion of water from its streams. The reference to pollution is, in fact,

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the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe." [Italics supplied.]

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[5] Shortell v. Des Moines Electric Co., 186 Iowa 469, 172 N. W. 649.

secondary to the primary requirement concerning diversion; and some diversion usually occurs in connection with [fol. 58] power projects. Neither is it reasonable to suppose that the State was concerned only with pollution of streams navigable under state classification as distinguished from other navigable streams. We conclude that the Commission properly rejected this contention.

Petitioner's second, alternative contention challenges the Iowa law upon the ground of unconstitutionality. It assumes that the jurisdiction of the Federal government over navigable streams, in so far as the licensing of power projects is concerned must be exclusive in nature, requiring a uniform rule of regulation and excluding, altogether, state regulatory legislation. We conclude that this contention and the assumption upon which it is based are unsound. Where Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.[6] The fact that particular phases of an interstate activity have long been regulated by states, has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory laws should be declared valid.[7] The same reasoning should apply where Congress, having newly decided to enter a particular field of interstate commerce, leaves untouched regulatory state laws concerning part of the area. Where the Federal law *authorizes* state action, such action is permissible even as to matters which could otherwise be regulated only by uniform national enactments.[8]

In enacting the Federal Power Act, it was not the intention of Congress that the Federal government should occupy the field completely, or that the states should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State,

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[6] See Hines v. Davidowitz, 312 U. S. 52, 68, and authorities there cited.

[7] United States v. South-Eastern Underwriters Association, 322 U. S. 533, 548-549, n. 32.

[8] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 155, and authorities there cited.

as well as by the Federal government.[9] This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act.[10]

Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent with constitutionality.[11] All parties agree that Iowa's courts have not, so far, been faced [fol. 59] with this issue. We see several possible interpretations of the disputed Sections which would avoid the issue. For example, upon application properly made to it, the Executive Council might find the "nearest practicable place,"[12] at which the water which is to be diverted for petitioner's project can be returned, is the point at which petitioner proposes to return it; or, perhaps, it might adopt petitioner's suggested interpretation that Chapter 363 has no application to navigable waters of the United States. Again, it will be noted that Section 7771 is so phrased as to vest large discretion in the Executive Council. The next

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[9] United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 75 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807.

[10] Sections 4 (e), 4 (f), 7 (a), 10 (e), 14, 19, 20, 27; 16 U. S. C. A. §§ 797 (e), 797 (f), 800 (a), 803 (e), 807, 812, 813, 821.

[11] Crowell v. Benson, 285 U. S. 22, 62, and authorities cited; Buttfield v. Stranahan, 192 U. S. 470, 492; Nicol v. Ames, 173 U. S. 509, 514; United States v. Gettysburg Electric Railway, 160 U. S. 668, 680; Lewis Publishing Co. v. Morgan, 229 U. S. 288, 311.

[12] See Iowa Code (1939) c. 363, § 7771.

succeeding Section, 7772,[13] is phrased in negative terms: "No permit shall be granted * * *." Evidently the Legislature intended that failure to secure a certificate of the State Department of Health should bar the issuance of a permit. The contrast between the two Sections is striking. While no departure from the requirements of the second is permissible, it is entirely within the range of probability that a court would so interpret the first Section as to allow the issuance of a permit without strict compliance with all its terms; especially if it were necessary to do so in order to avoid unconstitutionality.[14] In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so.

On this appeal the Commission argues that the Iowa statute is invalid.[15] It does so, however, not on petitioner's

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[13] Iowa Code (1939) c. 363, § 7772: "No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application."

[14] Cf. Nicol v. Ames, 173 U. S. 509, 514 et seq.; Buttfield v. Stranahan, 192 U. S. 470, 492 et seq.; Consumers Union of United States v. Walker, — U. S. App. —, —, 145 F. (2d) 33, 35.

[15] The Commission's position, as set out in its brief, is that the sole basis of its dismissal order was its finding that petitioner had failed to submit satisfactory evidence of compliance; but that Section 9 (b) of the Power Act does not require compliance with an invalid state law (United States v. Bellingham Bay Boom Company, 176 U. S. 211, 217, 218); that the lawfulness of its order depends upon the validity of the Iowa law, which was assumed by it because, as an administrative agency, it was without power to make a judicial determination of the question, or to disregard the presumption of validity of such laws (Davies Warehouse Co. v. Bowles, 321 U. S. 144, 153).

theory that Iowa invaded, or continued to occupy, an area absolutely prohibited to it by the Constitution, but rather that Congress, having elected to exercise, in part, the power delegated by the Commerce Clause, excluded the states from the area, proportionately to its exercise of power. It says, specifically, that the disputed Code Sections conflicted with the Power Act and were superseded by it;[16] that to require petitioner's compliance with Chapter 363 of the Iowa Code [fol. 60] would oust the United States of jurisdiction and defeat the primary objectives of the Power Act.[17]

The question thus presented is a difficult one. On the one hand, it is necessary that full scope shall be given to the Power Act in order that its beneficent purposes may be

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[16] See Hines v. Davidowitz, 312 U. S. 52; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148.

[17] 56 Cong. Rec. 9109 (1918), Congressman LaFollette, speaking on behalf of the Bill, said: "This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment. We have for many years been trying to develop more or less power from rushing or falling water in many States of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation. It is true that some of the States have granted such rights, and dams have been built, and their legality upheld by the courts, and there have been many interesting questions raised and decisions rendered; but time forbids my going into that phase of this question. Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority, but little development has been made. * * * This bill is brought here because it is apparent that we can

achieved in the expansion of our national economic life.[18] On the other hand, the established interests of the states and of their citizens must be protected and preserved so far as is possible,[19] in accomodating the one to the other. To answer the question, we are required to enter an area of controversy to which the Supreme Court has referred as

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get no development under a divided authority, and development is needed. Our not having greater development is inexcusable on any other ground than lack of grasp of the situation and inability to cope with it. This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the St tes nor to impede or restrict navigation, but rather to benefit it."

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[18] Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U. S. 508.

[19] Colorado v. Kansas, 320 U. S. 383, 392; Nebraska v. Wyoming (decided June 11, 1945), — U. S. —, —, —, 13 U. S. L. Week 4498, 4502, 4504.

[20] United States v. Appalachian Electric Power Co., 311 U. S. 377, 423: "The briefs and arguments at the bar have marshalled reasons and precedents to cover the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. We deem the pictured extremes irrelevant save as possibilites for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision."

"the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act."[20]

The best we can do, under the circumstances, is to apply the standards which have been used by the Supreme Court, in analogous cases. Summarized briefly, the generally applicable principles are as follows: [1] When the question is whether a Federal act—within admitted Federal authority—overrides a state law, the rule is clear that state [fol. 61] action may be excluded by clear implication or inconsistency,[21] just as well as by express language. In answering the question, however, the entire scheme of the statute must be considered.[22] [2] The expression of a purpose to limit the exertion of state power in some respects strongly suggests that Congress intended not otherwise to trammel the exercise of state power, in the same area.[23] [3] When the prohibition of state action is not specific but merely inferable from the scope and purpose of the Federal legislation, it must be clear that the Federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.[24] [4] Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by considerations which are persuasive of the statutory purpose.[25] [5] in ascertaining the scope of such legislation, a proper adjustment of the local and national interests must be, always, in the background.[26] To this end the primary test to be applied is not the mechanical one of whether the particular activity affected by the state law is part of interstate commerce, or the arbitrary one of whether the Federal legislation can be stretched to cover a particular project, but, rather, whether the over-all, competing demands of the state and national interests involved can be accommodated.[27]

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[21] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 157.

[22] Savage v. Jones, 225 U. S. 501, 533.

[23] Mintz v. Baldwin, 289 U. S. 346, 351.

[24] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 156, and authorities there cited.

[25] Maurer v. Hamilton, 309 U. S. 598, 614.

[26] Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 351.

[27] United States v. South-Eastern Underwriters Association, 322 U. S. 533, 548, and n. 31.

[6] The interest of the state in securing compliance with its statutes must be balanced against the effect of such control on interstate commerce in its national aspect.[28] [7] Absorption of state authority is, necessarily, a delicate exercise of legislative policy to achieve a wise adjustment between the needs of central control and the maintenance of strong local institutions.[29] [8] Where a Federal agency is authorized to invoke an overriding Federal power, except in certain prescribed situations, and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference alone.[30] This rule is applicable to the Federal Power Commission.[31]

Sometimes it is the purpose of Congress, in enacting legislation for the regulation of interstate commerce, to strengthen and assist state control and regulation, rather than to impair or diminish it.[32] The legislative history of [fol. 62] the Federal Power Act reveals such an intention.[33] Consequently, we should not find in it contrary radiations, beyond the obvious meaning of its language, unless otherwise its major purpose would be defeated.[34]

The licensing authority of the Commission is broadly stated in the Power Act to cover projects which are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of inter-

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[28] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 506.

[29] Palmer v. Massachusetts, 308 U. S. 79, 84: "Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transporation to the plain mandate of Congress."

[30] Yonkers v. United States, 320 U. S. 685, 692.

[31] The Connecticut Light and Power Company v. Federal Power Commission, (decided March 26, 1945) — U. S. —, —, 13 U. S. L. Week, 4265, 4268.

[32] Federal Power Commission v. Hope Natural Gas Co. 320 U. S. 591, 610.

[33] Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61, 76.

[34] See Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 351.

state or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; * * * ." To the extent that a state law places *any* obstacle in the way of that broad objective it may be said to conflict with the Power Act.[35] But that is not enough to show that the state law has been superseded. The Commission recognizes that the Act limits its powers in some respects; that by express limitation the Act "saves" some state laws from supersedure. Its theory may be summarized as follows: [1] In enacting the Power Act, Congress assumed that the usual rules as to supersedure would apply to state laws; [2] accordingly, it was necessary to include in the Act explicit provisions to "save" those state laws which Congress wanted to leave in effect; [3] thus, Section 27 specifically provided that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating *to the control, appropriation, use, or distribution of the water used in irrigation or for municipal or other uses* * * *" [Italics supplied]; [4] in contrast, Section 9 (b) of the Act merely provides for the submission of information to the Commission by an applicant for a license, *i. e.*, satisfactory evidence that it has complied with the requirements of state laws "with respect to bed and banks and to the appropriation, *diversion* and use of water for power purposes * * *"

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[35] Federal Power Act § 10 (a), 16 U. S. C. A. § 803 (a); See also § 7 (a), 16 U. S. C. A. § 800 (a): "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." See generally § 4, 16 U. S. C. A. §797.

[Italics supplied]; [5] accordingly, Section 9 (b) does not indicate any Congressional intention to "save" a state law which would otherwise be superseded by the Federal Power Act because in conflict with the objectives of the Act.

We cannot agree with the Commission's conclusion as to the effect of Section 9 (b). This Section is the one which expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects. It just as effectively "saves" state laws "with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes" [fol. 63] as does Section 27 with respect to laws "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses."

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[5] The bill (S. 1419) as it passed the Senate contained this provision: "* * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The Senate bill was rejected by the House but the substitute House bill (H. R. 8716) as it was reported by the committee provided that an applicant for a license should submit to the proposed commission: "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

Section 9 (b) was amended to its present form by the House upon motion of Representative LaFollette, who, speaking on behalf of his amendment, said: "Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds

Any other interpretation would lead to unjust, if not absurd, results.[2]

In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give to the states a veto power over them. The Federal Power Act contemplates cooperative action toward a common, beneficial end. There is no reason—revealed in the Act or otherwise—why states in which water is used primarily for irrigation should stand in any different relation to the National Government, in this respect, than states in which water is used primarily for other purposes. Consequently, if one state should, under the title of irrigation laws, provide, arbitrarily, that no Federal water power project could be constructed or operated within its boundaries, that law would be just as fatally inconsistent with the Federal Power Act as would a similar enactment, in any other state, under any other title. On the other hand, it was not

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and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says: 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.' In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property * * *." 56 Cong. Rec. 9810 (1918).

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[2] *Cf.* Consumers Union of United States v. Walker, —, U. S. App. —, —, 145 F. (2d) 33, 35, and authorities cited.

the purpose of Congress that the Commission should ride roughshod over any state, whatever the nature of its water laws, or give to a private corporation, licensed by it, the [fol. 64] plenary power of eminent domain,[38] unless that corporation had first subjected itself to the state control[39] which protect the rights, powers, privileges and immunities of its other citizens. Carrying petitioner's argument to its logical conclusion, it would follow that if the Commission could be persuaded to make appropriate findings, a licensee might, by so specifying in its application, take over the State House for its headquarters office or flood the capital city for a storage basin.[39]

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[38] Federal Power Act § 21, 16 U. S. C. A. § 814: "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain * * *."

[39] United States v. Southern Power Co., 4 Cir., 31 F. (2d) 852, 856: "While it is well settled that land devoted to a public use may be taken for another public use under the power of eminent domain, it is equally well settled that this may not be done, unless the intention of the Legislature to that effect has been manifested in express terms or by necessary implication. * * * It is true that this rule is ordinarily applied in grants of power to public service corporations, and not where the power is being exercised by the state itself for its immediate purposes. * * * But it is based, not upon any lack of power upon the part of the government, but upon the presumed intention of the Legislature, and should be held to apply in condemnation proceedings, even by the state itself, where the prior public use could not reasonably interfere with the purpose for which condemnation is authorized." The right of eminent domain is a sovereign one inherent in the Federal Government and may be exercised without the consent of a state: Kohl v. United States, 91 U. S. 367; Chappell v. United

In this connection the intervenor calls to our attention, as an additional reason for upholding the Commission's order, Section 7796 of the Iowa Code which reads as follows: "Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state owned lands." The intervenor says, and petitioner does not deny, that shown in the descriptive statement of the proposed project, submitted to the Power Commission, many portions of the United States and State primary highways will be flooded; that, in the event the project is constructed, those highways will have to be rerouted and reconstructed; that petitioner admits it has made no application for the permit required [fol. 65] by Section 7796.[49] Nothing appears in the record to excuse petitioner's failure to comply with Section 7796. For this reason alone, therefore, the Commission's order must stand.

States, 160 U. S. 499, 510. The fact that land within the state is already devoted to a public use does not limit the Federal Government's power to condemn: United States v. Gettysburg Electric Railway, 160 U. S. 668, 681. It may condemn public property held in a governmental or proprietary capacity by the states or their instrumentalities: Jefferson County, Tenn., v. Tennessee Valley Authority, 6 Cir., 146 F. (2d) 564 (roads and highways), United States v. Town of Nahant, 1 Cir. 153 F. 520 (sewers and water pipes), United States v. 4,450.72 Acres of Land, D. Minn., 27 F. Supp. 167 (state game preserve), Missouri v. Union Electric Light & Power Co., D. C. C. D. Mo., 42 F. (2d) 692 (land occupied by county courthouse and jail), United States v. Jotham Bixby Co., D. C. S. D. Calif., 55 F. (2d) 317, *aff'd sub nom.*, C. M. Patteni & Co. v. United States, 9 Cir., 61 F. (2d) 970, *dismissed as moot*, 289 U. S. 705 (municipal park), Stockton v. Baltimore & N. Y. R. R., C. C. D. N. J., 32 F. 9, 19, 20, *appeal dismissed*, 140 U. S. 699 (tide lands held by state in trust for public); Town of Bedford v. United States, 1 Cir., 23 F. (2d) 453 (road), Georgia v. Chattanooga, 264 U. S. 472 (state owned railroad property in another state).

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[49] Maurer v. Hamilton, 309 U. S. 598, 614.

But apart from Section 7796, and considering only the two Sections upon which appellant and appellee have made the case to turn, Sections 7767 and 7771, we conclude that the area of law covered thereby is so obviously within the domain of the state's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear [41] than it does in the Power Act. The maintenance of running streams, the preservation of wildlife, the rights of riparian owners, long-established land titles,[42] drainage, sewage and industrial waste disposal; these and many other problems of public health and public policy are involved. These are problems which should be worked out by diplomatic adjustment of state and national interests.[43] The Commission's licensee should be an agent toward this end, rather than an antagonist of the state and its other citizens.

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[41] See Florida v. United States, 282 U. S. 194, 211-212.

[42] Hardin v. Jordan, 140 U. S. 371, 380-381; Speech of Representative LaFollette, speaking on Section 9 (b), 56 Cong. Rec. 9810 (1918), *supra*, note 36.

[43] Parker v. Brown, 317 U. S. 341, 362-363: "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * * Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution.[44] The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Needless to say, no findings or decision of the Commission could enlarge the scope of the Act or increase the Commission's power under it. It would serve no useful purpose, for example, to produce electric power—thus carrying out the beneficent objective of the Federal Power Act—if by so doing the community to be served with electricity were turned into a barren, unpopulated waste. Again, if the result of constructing a power project were to strip one state of its water in order to serve the needs of another, it would require convincing evidence of legislative intention to justify it. If Congress wished to produce such results it would speak clearly and unmistagably. On the contrary, it has required an applicant to show that he has complied with the state laws. We think it [fol. 66] meant compliance, not information that he has failed to comply.

A situation closely analogous to that of the present case may be found in *Maurer* v. *Hamilton*[45] where the Supreme Court was required to reconcile or strike down a Pennsylvania law whose purpose was to protect its people and its highways. It chose the former alternative. That case involved the Federal Motor Carrier Act[46] which, in Section 204, conferred upon the Interstate Commerce Commission authority to regulate "safety of operation and equipment" of motor vehicles used by carriers in interstate commerce. Section 225 of that Act reserved to the states power to regulate "sizes and weight" of motor vehicles. It was

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[44] Cf., Kohl v. United States, 91 U. S. 367, 374; United States *ex rel.* Tennessee Valley Authority v. Powelson, 319 U. S. 266, 279; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 154 156, and authorities cited; see Collins v. Yosemite Park & Curry Co., 304 U. S. 518, 530; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186, 203; James v. Dravo Contracting Co., 302 U. S. 134, 147.

[45] 309 U. S. 598.

[46] 49 Stat. 543 (1935), 49 U. S. C. A. §§ 301-327.

contended that the Pennsylvania statute, which prohibited the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator of such carrier vehicle, was superseded by rules and regulations promulgated by the Commission under the Motor Carrier Act. The Interstate Commerce Commission had interpreted the law in such manner as to permit such carriage. The Pennsylvania law constituted an insurmountable obstacle to it. The Supreme Court held there was no supersedure.[47] The test, then, is not whether a state law happens to block action which a Federal agency may chance to approve. Instead, it is whether the state law frustrates the operation of the Federal law, prevents accomplishment of

[47] Maurer v. Hamilton, 309 U. S. 598, 610-611: "But the question remains whether the Pennsylvania statute is a regulation of 'size and weight' within the meaning of § 225, or whether it is a regulation of 'safety of operation and equipment,' which the Commission was authorized to make by § 204 (1) (2). Perusal of the present record can leave no doubt that in both a technical and a practical sense § 1033 (c) is a regulation of weight and size of the loaded motor vehicle, and that the Pennsylvania Legislature intended it to be such. By providing that the carried car shall not be loaded above the cab, the statute sets practical limits to the height of the loaded car and precludes its projection beyond the cab of the carrier car and into the line of vision of its driver. It is also a restriction on weight distribution of the loaded car and in its amended form specifically prohibits placing the 'weight' of the carried car above the driver. The highest court of the state has declared that such are the purposes of subsection (c), in order to avoid the safety hazards resulting from improper weight distribution and the height of the carried car at a point where it cannot be observed by the driver. As interpreted and applied by the state court, we can not regard the regulation as other than an exercise of the state's power to protect the safe and convenient use of its highways through the control of size and weight of motor vehicles passing over them, which it was the purpose of § 225 to reserve to the state from the grant of regulatory power to the Commission. Being thus reserved we think it is unaffected by the authority conferred on the Commission by § 204 to regulate 'safety of operation and equipment.'"

its purpose, refuses to its provisions their natural effect;[48] whether, in short, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[49] If it does, then it must yield. We conclude that no such showing has been made in the present case. The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law.

Mr. Justice Arnold sat during the argument of this case; concurred in the result reached in this opinion, but resigned from the Court before the opinion was completed.

Affirmed.

[fol. 67] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 13, 1945. Joseph W. Stewart, Clerk.

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC CORPORATION, Petitioner

vs.

FEDERAL POWER COMMISSION, Respondent,

STATE OF IOWA, Intervenor

On Petition for Review of Order of the Federal Power Commission. (Heard before Groner, Chief Justice, and Miller and Arnold, Associate Justices.)

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

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[48] Savage v. Jones, 225 U. S. 501, 533; Asakura v. Seattle, 265 U. S. 332; Hines v. Davidowitz, 312 U. S. 52, 67.

[49] Hines v. Davidowitz, 312 U. S. 52, 67; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 157; cf. Hill v. Florida, (decided June 11, 1945) — U. S. —, 13 U. S. L. Week 4529.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Groner.

Dated August 13, 1945.

Mr. Justice Arnold sat during the argument of this case; concurred in the result reached in the opinion, but resigned from the Court before the opinion was completed.

[fol. 68] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 24, 1945. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

STATE OF IOWA, Intervenor

MOTION FOR EXTENSION OF TIME WITHIN WHICH PETITION FOR REHEARING OR PETITION FOR MODIFICATION MAY BE FILED

The Federal Power Commission, Respondent in the above-entitled matter, respectfully petitions this Court for an extension of time to September 10, 1945 within which Respondent may file a petition for rehearing or petition for modification of the opinion entered by this Court on August 13, 1945 and in support thereof represents:

Charles V. Shannon, Howard E. Wahrenbrock, Willard W. Gatchell, and L. W. McKernan appear as counsel of record for Respondent in this matter. Messrs. Shannon and Gatchell are no longer with the Federal Power Commission, having resigned some time prior to August 13, 1945. Mr. McKernan has been on vacation since August 11, 1945 and

still is on vacation. Mr. Wahrenbrock, who argued the case and is the attorney most intimately familiar with this proceeding, has been engaged in the trial of a matter in Omaha, Nebraska, since August 8, 1945 and is still engaged in the trial of that matter. As a result of Mr. Wahrenbrock's engagement, he has had no opportunity to give careful consideration to the opinion and to determine whether [fol. 69] or not a petition for rehearing or petition for modification should be filed, and will have no opportunity to give such consideration to the matter before August 27, 1945.

This motion is, therefore, filed upon Mr. Wahrenbrock's request, not for the purpose of delay but to afford counsel for Respondent an opportunity to consider carefully the opinion and to determine whether a petition for rehearing or petition for modification should be filed.

Wherefore, Respondent prays that the extension of time herein requested be granted.

Done in the City of Washington, District of Columbia, this 24th day of August, 1945.

Federal Power Commission, by Reuben Goldberg, Principal Attorney, Federal Power Commission.

[fol. 70] Acknowledgements of Service

On behalf of First Iowa Hydro-Electric Cooperative, Petitioner, I hereby accept service of the within and aforegoing motion of Respondent and acknowledge receipt of a copy thereof this 24 day of August, 1945.

George B. Porter, For and on behalf of all attorneys for Petitioner.

On behalf of the State of Iowa, Intervenor, I hereby accept service of the within and aforegoing motion of Respondent and acknowledge receipt of a copy thereof this 24 day of August, 1945.

C. Walter Harris, For and on behalf of all attorneys for Intervenor.

[fol. 71] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 31, 1945. Joseph W. Stewart, Clerk.

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC CORPORATION, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

ORDER

On consideration of the respondent's motion for extension of time to file petition for rehearing or for modification of the opinion herein to September 10, 1945, It is

Ordered by the Court that the time be, and it is hereby, extended to and including September 15, 1945.

PER CURIAM:

Dated August 31, 1945.

[fol. 72] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sept. 15, 1945. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

PETITION FOR MODIFICATION OF OPINION

The Federal Power Commission, respondent in the above-entitled proceeding, respectfully petitions this Court to

modify the following language in the opinion filed on August 13, 1945 (page 4 of the slip sheet copy):

> "The Commission asks this court to set aside its order and declare the Iowa Statute invalid."

In support of its petition, respondent respectfully shows to this Court the following:

Both in their brief for respondent and in oral argument, Commission counsel sought in every way possible to take and adhere rigorously to the position that: (1) the Commission had properly refused to consider the petitioner's contentions as to the alleged invalidity of Chapter 363 of the Iowa Code; but (2) that that issue was presented to this Court for decision, and (3) while it was inappropriate for counsel for the Commission to urge any position on that [fol. 73] question counsel were submitting a discussion of the scope and objectives of the Federal Power Act, deemed relevant to the decision of the issue presented to this Court.

Nowhere in the brief, and at no time in oral argument, did the Commission, by its counsel ask "this Court to set aside its order and declare the Iowa Statute invalid." On the contrary, in the "Summary of Argument," contained in respondent's brief, respondent stated that "no position is taken in this brief" as to the "validity of the Iowa Statute" (Resp. Br. p. 4) and at page 8 of its brief further stated that "it appears inappropriate for us to urge a position on that question in this brief" since the Commission had "properly refused to consider the merits of petitioner's contentions as to the alleged constitutional invalidity of the Iowa Statute."

While it is the fact that respondent presented "a brief discussion of the scope and objectives of the Federal Power Act" (Resp. Br. p. 9), relevant to the question, respondent clearly stated that the summary discussion was presented merely for "the assistance of the Court" (Resp. Br. p. 9). Moreover, in the "Conclusion" to its brief respondent confined itself solely to a statement that the question of the validity of the State statute was properly before the Court for determination (Resp. Br. p. 15). The same course was carefully followed in oral argument.

In view of the aforegoing it is respectfully submitted that the following sentence more fairly expresses the Commission's position:

> "The Commission in effect argued that the Iowa Statute was invalid, which would require that the Commission's order be set aside."

Wherefore, respondent respectfully requests that the Court modify the language of the opinion hereinabove quoted and referred to.

Federal Power Commission, by Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission.

[fol. 74] CERTIFICATE OF SERVICE

I, Howard E. Wahrenbrock, of counsel for Respondent Federal Power Commission, certify that on September 15, 1945, I served copies of the aforegoing petition upon Petitioner First Iowa Hydro-Electric Cooperative by mailing a copy thereof to petitioner's counsel of record, George B. Porter, 1101 Earle Building, Washington, D. C. and upon Intervenor State of Iowa by mailing a copy thereof to intervenor's counsel of record, Horace L. Lohnes, 1111 Munsey Building, Washington, D. C.

Howard E. Wahrenbrock.

[fol. 75] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sep. 26, 1945. Joseph W. Stewart, Clerk

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

Before: Groner, C. J., and Miller, J.

ORDER

On consideration of respondent's petition for modification of opinion in the above entitled case, It is

Ordered by the Court that the motion be, and it is hereby, granted to the extent of substituting the following sentence for the first sentence of the new paragraph beginning on page 4 of the opinion:

On this appeal the Commission argues that the Iowa statute is invalid.

Per Curiam.

Dated September 26, 1945.

[fol. 76] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Nov. 5, 1945. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to petitioner's brief.
2. Motion of State of Iowa for leave to intervene.
3. Order authorizing the State of Iowa to intervene.
4. Minute entry of argument.
5. Opinion of the United States Court of Appeals.
5½. Judgment and Decree.
6. Respondent's motion for extension of time within which petition for rehearing or petition for modification may be filed.
7. Order of United States Court of Appeals on above motion of Respondent.
8. Respondent's petition for modification of opinion.
9. Order of United States Court of Appeals modifying the opinion of the court.
10. This designation of record.
11. Clerk's certificate.

Geo. B. Porter (S.), Attorney for First Iowa Hydro-Electric Cooperative, Petitioner.

[fol. 77] Acknowledgments of Service

On behalf of Federal Power Commission, Respondent, I hereby accept service of the within and foregoing Desig-

nation of Record of Petitioner and acknowledge receipt of a copy thereof this 5th day of November, 1945.

Howard E. Wahrenbrock (S.), Attorney for Federal Power Commission.

On behalf of the State of Iowa, Intervenor, I hereby accept service of the within and aforegoing Designation of Record of Petitioner and acknowledge receipt of a copy thereof this 5th day of November, 1945.

C. Walter Harris (S.), for and on behalf of all attorneys for Intervenor.

[fol. 78] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 77, both inclusive, constitute a true copy of the joint appendix of the parties and the proceedings of the said Court of Appeals as designated by counsel for petitioner in the case of: First Iowa Hydro-Electric Cooperative, Petitioner, vs. Federal Power Commission, Respondent, State of Iowa, Intervenor, No. 8752, October Term, 1945, as the same remain upon the files and record of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of November, A. D. 1945.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.